

REMARKS

Rejections under 35 USC §103

Claims 1-10, 12-20 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Chen (US 6324703 B1) in view of Chung et al. (KR 2002069596).

Claim 11 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Chen (US 6324703 B1) and Jung et al. (KR 2002069596) further in view of Lennon et al. (US 2003/0165451). The rejections are respectfully traversed.

In contrast to the climaproof cosmetic complex of the present invention, both Chen and Jung et al. relate to entirely different fields of technology, perform very different functions (i.e., thermal adhesive and insulating gel), solve vastly different problems and are classified in different fields of classification. Furthermore, even if Chen and Jung et al. were analogous art, which they clearly are not, the combination of Chen and Jung et al would not lead a skilled worker to the present invention since they are both silent regarding multiple elements of the present invention (i.e., elements (iii), (iv) and (v) of the present invention). Thus, even the combination of references would not lead a skilled worker to the present invention.

A January 2008 BPAI decision entitled In re Wada and Murphy reversed a § 103 rejection because the Examiner did not explain where or how cited art taught or suggested all of the features of a claimed invention. See, for example, the following BPAI articulation of applicable law:

When determining whether a claim is obvious, an examiner must make "a searching comparison of the claimed invention - including all its limitations - with the teaching of the prior art." In re Ochiai, 71 F.3d 1565, 1572 (Fed. Cir. 1995) (emphasis added). Thus, "obviousness requires a suggestion of all limitations in a claim." CFMT, Inc. v. Yieldup Intern. Corp., 349 F.3d 1333, 1342 (Fed. Cir. 2003) (citing In re Royka, 490 F.2d 981, 985 (CCPA 1974)). Moreover, as the Supreme Court recently stated, "there must be some articulated reasoning with some rational underpinning to support the legal conclusion of obviousness." KSR Int'l v. Teleflex Inc., 127 S. Ct. 1727, 1741 (2007) (quoting In re Kahn, 441 F.3d 977, 988 (Fed. Cir. 2006) (emphasis added)).

Chen et al (US 6,324,703) relates to tear resistant insulating gel composition for extreme cold weather. The insulating gels are used in forming articles for the human body such as boots, face masks, gloves, and full body wear. See col. 2, lines 36-38 and col. 4 lines 1-3. Thus, as mentioned above, Chen is clearly non-analogous art. Chen et al. is classified in IPC B64G 6/00 (Space Suits), A62BA (protective clothing) and A41D (protective garments). Applicant's claimed invention is directed towards a cosmetic complex that is water resistant and is classified in IPC A61K (Preparations for medical, dental or toilet purposes). The Chen reference is not reasonably pertinent to the present invention. A skilled worker in the field of cosmetic compositions for the skin would not logically look towards a teaching directed to insulating gels for use in protective clothing.

As previously noted, Chen fails to teach the specific polyester and amount of water-repellent crosslinked polyester (ii), water-absorbing powders (iii), thickening agents (iv), or organic solvents (v). Nor does Chen teach amounts of any of the elements in the climaproof cosmetic complex. Furthermore, the reference fails to teach the specific size of the water-absorbing polymers. Thus, the Chen reference fails to teach four out of the five recited elements in claim 1 and does not mention cosmetic compositions at all.

On page 5 of the Office Action, the Examiner states:

"The hydrophilic patches are held in place by the gel on one side and in direct contact with the skin" (col.6 lines 38-55), meeting limitation (iii) of claim 1 and 16 in part."

Applicants respectfully disagree with the assertion that limitation (iii) is met. Element (iii) of claim 1 is a powder having a particle size of 1 to 100 um. Chen is silent regarding powders or particles sizes. Chen et al. discloses water-absorbing patches that are inserted through slits of a mask or other part of a gel composite body suite. See column 6 at lines 30-32. These patches are discrete pieces of cotton or other water absorbing material. They are not even part of Chen's gel composite. Furthermore, they are not part of a cosmetic complex that is water resistant.

On page 8, first paragraph of the Final Office Action the Examiner alleges:

"the determination of optimal or workable proportions of the ingredients and size of the water-absorbing polymers by routine experimentation is obvious. One having ordinary skill in the art would have been motivated to do this to obtain the desired balance of better tensile, better tear better fatigue resistant and better feel gel properties."

However, a skilled worker in the cosmetic art would not be concerned or motivated by the tensile strength or tear-resistance of an insulating gel for protective clothing. These are simply not factors considered in a cosmetic composition for application to the skin. Furthermore, the Chen reference does not provide a skilled worker with amounts of any components, much less the amounts of five components that work together to form a cosmetic complex that is water resistant and contains essentially no emulsifier.

Chen does not meet the limitations of (ii) (i.e., a cross-linked polyester consisting of a polyol and a dicarbonic acid) and Chung et al.(KR2069596), which is also non-analogous art, does not cure this deficiency.

The Chung et al. (KR2069596) reference is also in an entirely different field (i.e., nonwoven fabric) from that of applicant's claimed invention (i.e., cosmetic complex that is water resistant). Chung et al. is classified in IPC C08G63 (Macromolecular compounds). The present invention is classified in IPC A61K (Preparations for medical, dental or toilet purposes). The reference is not reasonably pertinent to the present invention and would not logically have commended itself to the inventor's attention. The function of the polyester of Chung et al. is to provide thermal adhesive properties to bind fibers together. A skilled worker in the art of cosmetic compositions would never consider incorporating a thermal adhesive (used to bind fibers) into a cosmetic composition for the skin. Thermal adhesion or fiber binding are simply not factors considered in formulating cosmetic compositions which are water resistant. A skilled worker formulating a cosmetic composition would not be motivated by thermal adhesive properties which play no part what so ever in cosmetic compositions.

Furthermore, as previously discussed, and as noted on page 4, of the specification, "the gelled oil composition and the water-repellent cross-linked polyester are complementary in their properties...the overall effect of which exceeds the individual effect thus providing a

synergistic effectiveness.” Neither Chen et al. nor Chung et al. recognize this synergistic effect. Compare Example 7 which contains component (i) and (ii) and shows a better water resistance to Example 9 which contains a complex comprising adipic acid/diethyleneglycol/glycerine-copolymer. In addition, compare example 9 with example 11.

In response to Applicant’s previous comments regarding the complementary properties of the gelled oil composition and the water-repellent cross-linked polyester, on page 10 of the Final Office Action the Examiner contends that “the Chen reference teaches both components of the gel composition”. However, as previously noted, Chen is silent regarding component (ii) (i.e., 0.1 to 80 % by weight of a water-repellent cross-linked polyester having a molecular weight of 600 to 8000 and consisting of polyvalent alcohol and dicarbonic acid monomers).

With respect to claim 11, the Examiner further relies upon Lennon to show a similar composition which is useful as a foundation. Lennon relates to a composition in the form of a water-in-oil emulsion, comprising an aqueous phase dispersed in an oily phase and containing at least one emulsifier. Nothing within Lennon would teach a skilled worker to remove the emulsifier. The teachings of Lennon are conventional. Other than mere allegation, the Examiner has not pointed to any similarities between the present invention and the compositions of Lennon. Thus, Lennon does not cure the deficiencies of Chen or Chung et al. This rejection is untenable at least for the reasons discussed above for the primary reference.

The claimed invention as a whole, not just its individual elements or steps, must be considered. Elements (i), (ii), (iii), (iv) and (v) are present in a single homogenous composition which forms a water resistant film on the skin. Moreover, it is inappropriate to use hindsight guided by the applicant(s)'s disclosure. Since none of the references hint at waterproof cosmetic compositions and none of the references teach elements (iii), (iv) or (v), it is clear that appellants' own disclosure is impermissibly being used as a template to assert obviousness. See. e.g., In re Fritch 972 F.2d 1260, 23 USPQ2d 1780 (Fed. Cir. 1992) where the court stated:

It is impermissible to use the claimed invention as an instruction manual or ‘template’ to piece together the teachings of the prior art so that the claimed invention is rendered obvious.” This court has previously stated that “[o]ne cannot use hindsight reconstruction to pick and choose among isolated disclosures in the prior art to

deprecate the claimed invention".

Taken together the references would in no way lead one skilled in the art to arrive at the cosmetic complex of the present invention. Thus, it is respectfully requested that the rejections under 35 USC §103 be withdrawn.

The Commissioner is hereby authorized to charge any fees associated with this response or credit any overpayment to Deposit Account No. 13-3402.

Respectfully submitted,

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Attorney Docket No.:GULDE-69

Date: **16 February 2010**

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